IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BERNARD EARL WHEAT, Defendant.	No. CR96-4033-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE**

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I. INTRODUCTION AND FACTUAL BACKGROUND

In a six count second superseding indictment returned on October 29, 1996, defendant Bernard Earl Wheat and ten co-defendants were charged with one or more federal offenses, ranging from conspiracy to distribute and possess marijuana, cocaine, and methamphetamine, in violation of 21 U.S.C. § 21, (Count IV) to possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Counts I through III, and VI), to being a felon in possession of a firearm that has been transported in interstate commerce, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2).

On June 11, 1996, defendant Wheat pleaded guilty to one count of possessing methamphetamine with intent to distribute. The court allowed defendant Wheat to remain free on bond pending sentencing. At his sentencing, the court granted defendant Wheat's motion for downward departure for overstatement of his criminal history score. Defendant Wheat was sentenced to 151 months incarceration. Defendant Wheat did not appeal his sentence or conviction.

Pursuant to 28 U.S.C. § 2255, defendant Wheat filed his *pro se* Motion To Vacate, Set Aside Or Correct Sentence which is presently before the court. Defendant Wheat has subsequently amended his § 2255 motion three times. Defendant Wheat raises the following claims in his § 2255 motion and his amendments: that his counsel was ineffective for failing to raise issues under *Apprendi v. New Jersey*, 530 U.S. 466 (2000);
that the court improperly enhanced his sentence in light of the *Apprendi* decision; that his counsel was ineffective for failing to seek to exclude testimony of government witnesses because they received leniency on criminal charges they faced for their cooperation; that the court lacked jurisdiction because the Controlled Substances Act of 1970, 21 U.S.C. §§ 801-904, constitutes an unconstitutional delegation of power under the Commerce Clause; that his conviction was in violation of the Double Jeopardy Clause because the State of Iowa had previously pursued a forfeiture action against him; that the drug quantity used to calculate his sentence was incorrect; that the government improperly amended the

indictment and the government manipulated the charge to increase the length of his sentence; that his counsel was ineffective for failing to advise the court of his behavior while on pretrial release as a ground for a downward departure in his sentence; and, that his counsel was ineffective in not objecting to the two level enhancement for possession of a firearm in connection with the drug offense.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118

S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

Wheat readily acknowledges that none of the claims presented in his § 2255 motion were raised on appeal. Although Wheat does not clearly indicate why this procedural default should be excused, the court liberally construes his *pro se* motion to assert that his procedural default should be excused because it was the result of ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel in the context of a § 2255 motion must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Apfel*, 97 F.3d at 1076; *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Strickland*, 466 U.S. 697 (stating "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."); *Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The second part of the test is slightly modified where the conviction was entered on the basis of a guilty

plea. "In the guilty plea context, the convicted defendant must demonstrate that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Matthews*, 114 F.3d 112, 114 (8th Cir. 1993) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)), *cert. denied*, 522 U.S. 1064 (1998); *accord United States v. Prior*, 107 F.3d 654, 661 (8th Cir.), *cert. denied*, 522 U.S. 824 (1997). With these standards in mind, the court now turns to its consideration of the issues raised in Wheat's § 2255 motion.

B. Analysis Of Issues

1. Apprendi issues

The court initially takes up defendant Wheat's contentions that his counsel was ineffective for failing to raise issues under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because the United States Supreme Court's decision in *Apprendi* had not been decided at the time of defendant Wheat's plea, his counsel at the plea could not be expected to be clairvoyant and make divinations about the future state of the law. Federal courts have rejected ineffective assistance claims predicated on counsel's failure to predict passage of future law because "[c]lairvoyance is not a required attribute of effective representation." *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1541-42 (10th Cir. 1995). There is a distinction between "the failure of an attorney to be aware of prior controlling precedent--which might render counsel's assistance ineffective--from the failure of an attorney to foresee future developments in the law." *Id.* at 1542. At the time of Wheat's plea and his subsequent sentencing, Eighth Circuit law was squarely against an *Apprendi*-type argument. *See, e.g., United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993) (holding that drug quantity, even if alleged in the indictment, was not an element of the offense and was therefore determined at sentencing by the district court applying the preponderance of the evidence standard, not by the jury applying the beyond a reasonable

doubt standard), *cert. denied*, 511 U.S. 1020 (1994). The court has no trouble in determining that Wheat has failed to show deficient performance by his counsel and therefore cannot demonstrate ineffective assistance of counsel.

Defendant Wheat also contends that the court improperly enhanced his sentence in light of the Supreme Court's decision in *Apprendi*. Defendant Wheat relies on *Apprendi* as a new constitutional rule made retroactive by the Supreme Court. However, the Eighth Circuit Court of Appeals has held that *Apprendi* does not apply retroactively to cases on collateral review. *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 848 (2002); *Rodgers v. United States*, 229 F.3d 704,706 (8th Cir. 2000); *accord Talbott v. Indiana*, 226 F.3d 866, 868-70 (7th Cir. 2000); *In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 (1st Cir. 2000). Moreover, even if *Apprendi* were to apply retroactively, Wheat's substantive argument would also fail because Wheat stipulated to the amount of methamphetamine involved in his plea agreement. Thus, the *Apprendi* decision is inapplicable because the court made no finding of fact. *See United States v. White*, 240 F.3d 127, 134 (2nd Cir. 2001) (holding that where defendant stipulated at trial to the drug quantity at issue, any error in failing to include drug quantity in the elements of the offense charged to the jury was harmless). Therefore, this part of defendant Wheat's motion is denied.

2. Testimony obtained in violation of 18 U.S.C. § 201(c)(2)

Defendant Wheat also argues that his counsel was ineffective for failing to seek to exclude testimony of government witnesses because they received leniency on criminal charges they faced for their cooperation in the investigation. Defendant Wheat asserts that such compensation is prohibited under 18 U.S.C. § 201(c)(2).[1] Thus, Wheat makes the

[1] Section 201(c)(2) states that anyone who,

(continued…)

argument, briefly accepted by the Tenth Circuit Court of Appeals in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *opinion vacated and rehearing granted,* 144 F.3d 1361 (10th Cir.) (*en banc*), *on rehearing*, 165 F.3d 1297 (10th Cir.) (*en banc*), *cert. denied,* 527 U.S. 1024 (1999). The Eighth Circuit Court of Appeals, however, has clearly held § 201(c)(2) does not prohibit the government from offering evidence from witnesses who have received leniency in return for their testimony, or paying rewards to informants. *See United States v. Albanese*, 195 F.3d 389, 394 (8th Cir. 1999) (holding that the Eighth Circuit has "long history" of allowing government to compensate witnesses for their participation in criminal investigations); *United States v. Harris*, 193 F.3d 957, 958 (8th Cir. 1999) (holding that the government's use of a paid informant did not violate § 201(c)(2)). Therefore, this portion of defendant Wheat's motion is denied.

3. Constitutionality of the Controlled Substances Act

Defendant Wheat next contends that the court lacked jurisdiction because the Controlled Substances Act of 1970, 21 U.S.C. §§ 801- 904, constitutes an unconstitutional delegation of power under the Commerce Clause of the United States Constitution. The court concludes that defendant Wheat cannot demonstrate cause and prejudice to surmount his procedural default on this claim because defendant Wheat cannot demonstrate that his

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[1](…continued)

> directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom shall be imprisoned or fined for such conduct.

18 U.S.C. § 201(c)(2).

counsel provided ineffective assistance of counsel. The Eighth Circuit Court of Appeals rejected the same argument advanced by defendant Wheat here in *United States v. Davis*, 288 F.3d 359, 362 (8th Cir. 2002). In *Davis*, the court held that Congress may regulate intrastate drug trafficking under its Commerce Clause authority "because of the effect that intrastate drug activity has upon interstate commerce." *Id.* (citing *United States v. Patterson*, 140 F.3d 767, 772 (8th Cir. 1998)). The court explained that "[t]he findings which Congress made in enacting the Controlled Substances Act, 21 U.S.C. § 801(2)-(6), demonstrate that local manufacture and distribution of controlled substances substantially affect interstate traffic in those substances." *Davis*, 288 F.3d at 362 (citing *United States v. Bell*, 90 F.3d 318, 321 (8th Cir. 1996)). The court of appeals's decision in *Davis* is in accord with every other circuit to address this issue. *See United States v. Brown*, 276 F.3d 211, 214-15 (6th Cir. 2002) (citing cases). Therefore, this segment of defendant Wheat's motion is also denied.

4. Double Jeopardy

Defendant Wheat further argues that his conviction was in violation of the Double Jeopardy Clause of the United States Constitution because the State of Iowa had previously pursued a forfeiture action against him. The court again concludes that Wheat cannot demonstrate cause and prejudice to surmount his procedural default on this claim because defendant Wheat cannot demonstrate that his counsel provided ineffective assistance of counsel as to this issue. The Eighth Circuit Court of Appeals held in *United States v. Quinn*, 95 F.3d 8,9 (8th Cir. 1996), that such a claim is foreclosed by the United States Supreme Court's decision in *United States v. Ursery*, 518 U.S. 267, 287 (1996):

> we need not pursue the matter further than to cite the Supreme Court's recent opinion in *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). *Ursery* holds that civil forfeiture proceedings are not, in the absence of extraordinary circumstances, punitive for double-jeopardy purposes. We see nothing in the present case to take it out of

the general rule announced in *Ursery*.

Quinn, 95 F.3d at 9. Therefore, this part of defendant Wheat's motion is also denied.

5. Drug quantity

Defendant Wheat next contends that the drug quantity used to calculate his sentence was incorrect. It must be noted again that defendant Wheat stipulated in his plea agreement to having possessed 781 grams of a mixture or substance containing methamphetamine and that, due to the purity of the methamphetamine, he possessed at least 300 grams of actual methamphetamine. Plea Agreement at ¶ 14. Defendant Wheat cannot demonstrate cause and prejudice to surmount his procedural default on this claim. Defendant Wheat argues that his counsel was ineffective because he did not have the drugs found in Wheat's house independently tested. Even if the court were to assume *arguendo* that the failure of his counsel to secure independent testing of the drugs constituted constitutionally deficient performance, defendant Wheat cannot demonstrate that he was prejudiced by his counsel's failure to take such action here. Defendant Wheat has made no showing that the Iowa Department of Criminal Investigation's laboratory results were inaccurate or that an independent analysis of the drugs found in his residence would have likely produced a different result. Therefore, this portion of defendant Wheat's motion is also denied.

6. Amended indictment

Defendant Wheat further argues that the government improperly amended the indictment. Defendant Wheat also asserts that the government manipulated the charge to increase the length of his sentence. The court again concludes that Wheat cannot demonstrate cause and prejudice to surmount his procedural default on these claims because defendant Wheat cannot demonstrate that his counsel provided ineffective assistance regarding these issues. The indictment in this case was not amended. Rather, the government sought and obtained from the grand jury a superceding indictment in this case. The superceding indictment provided notice to defendant Wheat that the quantity of

methamphetamine he was alleged to have possessed in Count 1 exceeded 100 grams of a substance or mixture of methamphetamine. Moreover, defendant Wheat has made no showing that the government sought the superceding indictment for an improper reason. Therefore, this segment of defendant Wheat's motion is also denied.

7. Defendant's behavior on pretrial release

Defendant Wheat also argues that his counsel was ineffective for failing to advise the court of his behavior while on pretrial release as a ground for a downward departure in his sentence. The court concludes that defendant Wheat's counsel's performance was not deficient because among the grounds raised by his counsel for a downward departure was defendant Wheat's post-plea rehabilitative efforts. Sentencing Tr. at p. 5. The court, however, chose to grant defendant Wheat a downward departure on another ground, that category 3 overstated defendant Wheat's criminal history.[2] As a result, defendant Wheat was sentenced under criminal history category 2. Therefore, this part of defendant Wheat's motion is also denied.

8. Firearm enhancement

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[2]The court notes that under the Sentencing Guidelines, post-offense rehabilitation is one of the ways a defendant may demonstrate acceptance of responsibility warranting a reduction of the defendant's offense level. *See* U.S.S.G. § 3E1.1 comment, application n.1(g). However, because the acceptance-of-responsibility guideline already takes post-offense rehabilitation efforts into account, departure under § 5K2.0 for post-offense rehabilitation efforts "is warranted only if the defendant's efforts are exceptional enough to be atypical of the cases in which the acceptance-of-responsibility reduction is usually granted." *United States v. DeShon*, 183 F.3d 888, 889 (8th Cir. 1999); *accord United States v. Kapitzke*, 130 F.3d 820, 823 (8th Cir. 1997); *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997); *United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997). Given the non-compliance memorandum from the United States Probation Office concerning a urine sample supplied by defendant Wheat which tested positive for methamphetamine and amphetamine usage, Wheat had not demonstrated a positive and lasting transformation in his behavior that was extraordinary.

Defendant Wheat finally contends that his counsel was ineffective in not objecting to the two level enhancement for possession of a firearm in connection with the drug offense. During a search of defendant Wheat's home the police found 56 firearms. The court concludes that defendant Wheat's counsel's performance was not deficient because he did initially object to the two level enhancement. The government, however, indicated in correspondence to defendant Wheat that if he was going to object to the possession of a firearm enhancement then he was going to be in violation of the terms of the plea agreement and Wheat's case would have to be tried. Following this correspondence, defendant Wheat elected to withdraw his objection to the two level enhancement for possession of a firearm in connection with the drug offense and continue with the terms of the plea agreement. Moreover, Wheat was not prejudiced by his counsel's actions. Defendant Wheat benefitted under the terms of the plea agreement. The dismissal of the conspiracy count of the indictment precluded the possibility of defendant Wheat being held responsible for a greater amount of methamphetamine. Furthermore, the government promised not to pursue other charges against him, including a charge under 18 U.S.C. § 924(c) which could have resulted in defendant Wheat receiving consecutive sentences. Therefore, this portion of defendant Wheat's motion is also denied.

III. CONCLUSION

The court has considered each of the grounds raised in defendant Wheat's motion pursuant to 28 U.S.C. § 2255, and for the reasons set forth above, concludes that defendant Wheat is not entitled to have his sentence vacated, set aside, or corrected. Therefore, defendant Wheat's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**.

IT IS SO ORDERED.

DATED this 16th day of September, 2002.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA